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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term 1972
No. 72-6576

E. CHRISTMAN DAWN, individually and doing business as THE GAME COMPANY,

Petitioner,

vs.

STERLING DRUG, INC., and DANCER-FITZGERALD-SAMPLE, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PETITION NOT PRINTED

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents Sterling Drug, Inc., and Dancer-Fitzgerald-Sample, Inc. herewith oppose the Petition for Writ of Certiorari.

Jurisdiction.

Respondents agree with the Petitioner's Statement of Jurisdiction except that Respondents contend that this Court lacks jurisdiction to review one of the grounds raised by Petitioner.

Statement of the Case.

The subject of this case is the phrase "Tower of Babble". Petitioner manufactures and sells an educational language game under the name "Tower of Bab-

ble". Petitioner allegedly registered the name "Tower of Babble" with the United States Patent Office in 1962 and with the Secretary of State of California in 1968 as a trademark for "equipment sold as a unit for playing an educational language game." Respondent, Sterling Drug, Inc. (hereafter "Sterling") manufactures a diversity of products, including Bayer Aspirin. Respondent, Dancer-Fitzgerald-Sample, Inc. (hereafter "Dancer"), is an advertising agency employed by Sterling, and as part of its promotion for the sale of Bayer Aspirin had created a certain print advertisement wherein the phrase "Tower of Babble" appeared as a descriptive caption.

The Bayer Aspirin advertisement depicted a stack of assorted pills and headache remedies with the caption "Tower of Babble" beside the stack. Below that appeared a text which stated: "Confused by claims? by shapes and sizes? by strange-sounding ingredients? When you need fast relief from headache pain, don't forget this fact: Bayer ® is 100% aspirin. And aspirin is the strongest pain reliever you can buy. No wonder Bayer works wonders."

The foregoing factual background spawned two actions. The first was filed by Petitioner in the Superior Court of the State of California for the County of Los Angeles, bearing case No. NEC 7760 (hereafter "State Action"). The State Action was filed on or about October 30, 1968. Attached as Appendix C to the Petition for Writ of Certiorari is a true and correct copy of the decision rendered by the Court of Appeal of the State of California, Second Appellate District, Division One, in the matter of "E. CHRISTMAN DAWN, individually, and doing business as THE GAME COMPANY, Plaintiff and Appellant, vs. STERLING DRUG,

INC., and DANCER-FITZGERALD-SAMPLE, INC., Defendants and Respondents" (2nd Civ. No. 37416, Superior Court No. NEC 7760) filed December 1, 1971. On December 30, 1971, that Court denied Petitioner's Petition for Rehearing and on January 26, 1972, the Supreme Court of the State of California denied Petitioner's Petition for Hearing. Thereafter, Petitioner filed a Petition for Writ of Certiorari in this Court, bearing No. 71-6751 and by order dated October 10, 1972, this Court denied that Petition for Writ of Certiorari and on January 8, 1973, this Court denied Petitioner's Petition for Rehearing in connection with the Petition for Writ of Certiorari.

Petitioner filed the second action in the United States District Court on May 5, 1969 (hereafter "Federal Action"). It is the second action which is the subject of this Petition for Writ of Certiorari. The Federal Action alleges four causes of action for: trademark infringement, dilution of trademark, injury to business reputation and unfair competition.

The District Court granted summary judgment in favor of Sterling and Dancer on the issues of trademark infringement, injury to business reputation and unfair competition. Dawn appealed and the United States Court of Appeals for the Ninth Circuit affirmed on the ground, *inter alia,* that by virtue of the State Action judgment, Dawn is collaterally estopped from contending that the facts of this case give rise to any trademark infringement, injury to business reputation or unfair competition. Respondents also appealed from a separate aspect of the District Court's judgment but that appeal is not the subject of this Petition.

Reasons for Denying the Writ.

Petitioner first complains that the summary judgment entered against him in the State Action was obtained without due process. He argues that the failure to accord him due process in the State Action prevents the collateral estoppel effect of that judgment. However, the supposed violation of due process is nonexistent.

The record before the Court of Appeal for the State of California disclosed the undisputed facts that in moving for summary judgment, Respondents used and relied upon Petitioner's signed, sworn deposition. The deposition was lodged with the Court prior to the hearing on Respondent's motion for summary judgment and filed the day thereof. Several months thereafter, the same court considered a rehearing of that motion and still had before it the signed transcript of Petitioner's deposition.

Petitioner appealed the granting of summary judgment in favor of Respondents. On appeal, Petitioner contended for the first time that the court improperly considered his sworn, signed deposition because California practice requires a moving party to present his factual showing by affidavit. Petitioner argued in the alternative that the court improperly considered his deposition because the deposition was merely lodged with the court and not formally filed until the day of the hearing. The California Court of Appeal rejected each procedural point raised by Petitioner, characterizing them as "frivolous". In effect, the Court of Appeal held:

> (a) That a sworn, signed deposition is the same as an affidavit for purposes of California practice requiring a factual showing before granting sum-

mary judgment. This holding is supported by identical decisions in other reported California cases;

(b) That it is sufficient, for purposes of California practice, to lodge a deposition with the trial court, the essential issue being whether it is available to the trial court.

The California Supreme Court refused to review the decision of the California Court of Appeal and this Court refused to grant a Petition for Writ of Certiorari to review those issues which Petitioner now raises as a bar to the collateral estoppel effect. (Docket No. 71-6751.)

The thrust of Petitioner's argument is essentially not one of the violation of due process, inasmuch as Petitioner cannot validly contend that the deposition upon which summary judgment was granted was not before the trial court for its consideration. Rather, Petitioner has always contended, heretofore, that there is a technical failure to comply with the exact language of the California statute, *i.e.*, lodging the deposition rather than filing it. This being a federal court, there is no jurisdiction to review decisions of the California courts on matters of procedure under California law.

United States v. Pink (1942), 315 U.S. 203; 86 L ed 796; 62 S.Ct. 552;

Milk Wagon Drivers U. v. Meadowmoor Dairies, Inc. (1940), 312 U.S. 287, 296; 85 L ed 836, 843;

Chicago Life Ins. Co. v. Cherry (1917), 244 U.S. 25, 30; 61 L ed 966, 969; 37 S.Ct. 492.